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Nos. 96-986 and 96-7338

In the Supreme Court of the United States

OCTOBER TERM, 1996

JERRY BELLER, PETITIONER

v.

UNITED STATES OF AMERICA

ROBERT COFFMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in petitioners' prosecution for wire fraud, 18 U.S.C. 1343, the trial court correctly rejected petitioners' proffered instruction on materiality.

2. If materiality were an element of the offense of wire fraud, whether the trial court's failure to instruct separately on materiality was harmless error.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a)[1] is reported at 94 F.3d 330.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1996. A petition for rehearing was

[1] "Pet. App." refers to the appendix to the petition in No. 96-986.

denied on September 19, 1996. Pet. App. 18a. The petition for a writ of certiorari in No. 96-986 was filed on December 18, 1996. The petition for a writ of certiorari in No. 96-7338 was filed on December 16, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on six counts of wire fraud, in violation of 18 U.S.C. 1343 and 2.[2] Petitioner Beller was sentenced to 18 months' imprisonment, to be followed by three years' supervised release, and petitioner Coffman was sentenced to 13 months' imprisonment, also to be followed by three years' supervised release. The court of appeals affirmed. Pet. App. 1a-16a.

1. The evidence at trial showed that petitioners, along with co-defendants William Stoller, Robert Lansing, and Thresher Rippey, attempted to defraud the Smith Barney brokerage house in Chicago, by inducing Smith Barney to advance a $300,000 loan on worthless stock. On May 8, 1989, Stoller telephoned Smith Barney's Chicago office and spoke to Thomas McCausland, the broker of the day. Stoller said he wanted to sell several million dollars worth of stock, including restricted stock of the Firestone Development Company (FDC). Because it was unusual

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[2] Petitioner Beller also was convicted on one count of making a false statement to the FBI, in violation of 18 U.S.C. 1001. After trial and this Court's decision in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), Beller's Section 1001 conviction was dismissed on the government's motion. Co-defendants William Stoller and Robert Lansing pleaded guilty before trial.

for someone to offer to sell that amount of stock to whoever answered the telephone at a brokerage, McCausland sensed that something was awry. In addition, McCausland knew that restricted stock, which he took to mean stock that could not be sold until a future date stated on the stock certificate, is usually sold to corporate insiders, and Stoller had not indicated that he occupied such a position. Accordingly, McCausland reported his suspicions to superiors, who in turn contacted the FBI. Thereafter, an agent posed as a Smith Barney employee in meetings with the defendants. Pet. App. 2a.

The next day, May 9, Stoller met with McCausland and represented that he controlled a pool of assets that included $30 million worth of FDC stock. Petitioner Beller had created FDC in 1987. Although it never had any value, through the years Beller had falsely represented that FDC was worth tens and, at times, hundreds of millions of dollars. He also had misrepresented that a member of the Firestone tire family was chairman of the board. Pet. App. 2a.

Stoller offered to put up $1 million worth of restricted FDC stock as collateral for a $300,000 loan. According to Stoller, the stock restriction would expire in about six weeks. Stoller presented a written statement from petitioner Coffman, dated March 7, 1989, saying that FDC had $35 million in assets. Coffman was to be the borrower, with Stoller getting a $100,000 fee as broker of the loan. Stoller also provided phony balance sheets for Coffman and the company for which Coffman was borrowing the money. According to those balance sheets, Coffman had a net worth of $76 million and his company a net worth of $266 million. In reality, neither Coffman nor his firm had any assets. Pet. App. 2a-3a.

On May 22, 1989, McCausland and the undercover FBI agent met with Stoller, Coffman, and the other defendants, except for Beller, who participated in the meeting by telephone. The meeting ostensibly was to finalize the $300,000 loan, but the defendants made overtures for future loans. Rippey misrepresented that FDC was active in the telecommunications, real estate, and convenience store markets, when in fact it was an empty shell. He also said that, after the $300,000 loan was completed, there would be another $30 million in FDC stock to collateralize future loans. Coffman falsely said that the $300,000 loan was to be seed money for an ambitious project. When the time came to disburse the loan proceeds, FBI agents arrested the defendants who were present; Beller was arrested later. Pet. App. 3a.

2. At trial, petitioners requested the trial court to instruct the jury that, to find petitioners guilty, the jury had to find that the misrepresentations were material. The district court denied that request.[3] Petitioners renewed that claim on appeal, arguing that this Court's decision in *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), required such an instruction to the jury on materiality.

The court of appeals rejected petitioners' contention. The court of appeals reasoned that the false statements statute, 18 U.S.C. 1001, at issue in *Gaud-*

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[3] Petitioners' proposed instruction read, in pertinent part:

> The false or fraudulent representations (or failure to disclose) must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision.

See Coffman C.A. Br. App. 32a; Gov't C.A. Br. 32.

in, did not otherwise contain a "hint of materiality, so * * * the jury has to be instructed separately on that element." Pet. App. 9a. The term "fraud," however, according to the court, "embodies the concept of materiality. Fraud is a *material* misrepresentation or omission, in the sense of one relevant to the decision that the perpetrator of the fraud wants his intended victim to make." *Ibid.* Consequently, in the court's view, an instruction in the language of the statute adequately informs the jury of the materiality requirement. *Id.* at 9a-10a. Finally, the court found that, even if such an instruction were required, the failure to give it here was harmless in light of the overwhelming evidence of materiality. *Id.* at 10a.

ARGUMENT

Petitioners contend (96-986 Pet. 3-12; 96-7338 Pet. 10-18) that materiality is an element of the wire fraud statute, 18 U.S.C. 1343, and that the court of appeals erred in holding that it was not necessary to instruct the jury that it had to find that petitioners' misrepresentations were material. Contrary to petitioners' claim, materiality is not an element of the offense of wire fraud, and the district court correctly declined to instruct the jury on that concept. Further, even if materiality were an element of the offense of wire fraud, petitioners' formulation of that element is erroneous. Any error in failing to give a materiality instruction was, moreover, harmless. Accordingly, further review of petitioners' contention is not warranted.

1. This Court has made clear that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute."

Staples v. *United States*, 511 U.S. 600, 604 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)). Hence, "in determining what facts must be proved beyond a reasonable doubt the * * * legislature's definition of the elements of the offense is usually dispositive." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986). Courts may not alter the legislative definition of a criminal offense by adding elements that have no basis in the statutory text. See *United States* v. *Shabani*, 115 S. Ct. 382, 385 (1994) (rejecting court-imposed overt act requirement under 21 U.S.C. 846, which contains no such requirement); *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 256-269 (1994) (rejecting argument that RICO statute includes a requirement that the racketeering enterprise have an "underlying economic motive"). This Court recently applied that principle in *United States* v. *Wells*, No. 95-1228 (Feb. 26, 1997), in holding that 18 U.S.C. 1014, which does not use the term "material" in prohibiting false statements to banks, does not include materiality as an element of that offense. That same conclusion applies to the wire fraud statute, which also has no express materiality requirement.

Petitioners rely chiefly on *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), for their contention that the wire fraud statute requires proof of materiality, which they have described as proof that the deception "would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision." Çoffman C.A. Br. App. 32a; Gov't C.A. Br. 32. In *Gaudin*, the Court held that materiality, like other elements of a criminal offense, must be submitted to a jury in a prosecution brought under 18 U.S.C. 1001,

which prohibits false statements in a matter within the jurisdiction of a federal agency. 115 S. Ct. at 2314-2315. Section 1001, however, refers expressly to materiality. The first clause of Section 1001 punishes anyone who "knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a *material fact*, or makes any false, fictitious or fraudulent statements or representations" (emphasis added). Although the prohibition in the second clause of Section 1001 against "false, fictitious or fraudulent statements" is not followed by an express reference to material facts, the context of the statute suggests that the element of materiality is included in all offenses condemned by Section 1001, and the government has not argued otherwise. See *Gaudin*, 115 S. Ct. at 2313 (noting that this point was uncontested).

By contrast, Section 1343 imposes criminal penalties on anyone who devises a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." The statute requires proof that the defendant devised or participated in a scheme to defraud, that the defendant acted with intent to defraud, and that, in advancing the scheme, the defendant used some form of wire or electronic communication. See *United States* v. *Clevenger*, 733 F.2d 1356, 1358 (9th Cir. 1984); *United States* v. *Lemire*, 720 F.2d 1327, 1334-1335 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984). The text of Section 1343 includes no express materiality requirement. The absence of such an explicit materiality requirement in Section 1343 there-

fore "speaks volumes" about Congress's intent to omit such a requirement. *Shabani*, 115 S. Ct. at 385.[4]

2. Even if materiality were an element of the wire fraud offense, petitioners err in arguing that it would require proof that the fraud would have influenced a "reasonable and prudent person in relying upon the representation or statement." Coffman C.A. Br. App. 32a; see note 3, *supra*. That formulation is quite different from the definition of materiality set forth in *Gaudin* and other cases on which *Gaudin* relied, including *Kungys* v. *United States*, 485 U.S. 759

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[4] The court of appeals in this case stated (Pet. App. 10a) that the Ninth Circuit held materiality to be an element of mail fraud in *United States* v. *Halbert*, 640 F.2d 1000 (1981). In *Halbert*, the Ninth Circuit stated that a requirement of materiality "should apply to the misrepresentations which form the basis for a mail fraud violation," but held that the failure to give a materiality instruction was harmless error in light of the overwhelming evidence of materiality. *Id.* at 1008. The court reversed the mail fraud convictions on other grounds. *Id.* at 1006-1007. On a subsequent appeal after the retrial, the Ninth Circuit rejected a challenge to the materiality instruction given by the trial court. *United States* v. *Halbert*, 712 F.2d 388, 390 (1983), cert. denied, 465 U.S. 1005 (1984). The Ninth Circuit also recently rejected a plain-error challenge to a trial court's formulation of a materiality instruction in a mail fraud case. *United States* v. *Carpenter*, 95 F.3d 773, 776-777 (1996), cert. denied, No. 96-7615 (Feb. 24, 1997). The Ninth Circuit concluded that the trial court had in fact told the jury that it was to decide whether the misrepresentations related to a material fact, which the trial court defined as one that "would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision." *Id.* at 776. We are not aware of any decision in which the Ninth Circuit has reversed a mail fraud conviction because of the failure to instruct the jury that materiality was an element of the offense for the jury's consideration.

(1988). In *Gaudin*, the Court noted that, in a Section 1001 prosecution, the government must prove that the false statement had a "natural tendency to influence, or [be] capable of influencing, the decision of the [institution] to which it was addressed." 115 S. Ct. at 2313; see *Kungys*, 485 U.S. at 770. The Court did not suggest that the government must prove that the affected institution would have been "reasonable" or "prudent" in relying on the false statement.[5]

For their formulation of materiality, petitioners have relied on statements in mail and wire fraud cases that the fraud must be "reasonably calculated to deceive persons of ordinary prudence and comprehension." See 96-986 Pet. 6-7; Pet. App. 33a. As the court of appeals explained (Pet. App. 6a-7a), however, that language in the case law is generally intended to refer not to materiality but to an entirely different point, namely the *intent* of the defendant to deceive his victims:

> The "reasonable person" language has two purposes, neither of which has anything to do with declaring open season on the people most likely to be targets of fraud. The first is to guide the jury in evaluating circumstantial evidence of fraudulent intent: that the defendants' scheme was calculated to deceive a person of ordinary pru-

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[5] Petitioner Coffman acknowledges (96-7338 Pet. 17) that materiality in this Court's decisions refers only to a "natural tendency to influence * * * the decision of the decision making body to which it was addressed." His proffered jury instruction, however, requested the trial court to define a material fact for the jury as a fact that "would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision." See Coffman C.A. Br. App. 32a.

> dence is some evidence that it was intended to deceive. Evidence that the scheme could fool only an idiot would not be evidence of such intent—would be, if anything, evidence against an inference of such intent—unless the scheme was aimed at an idiot.

Id. at 7a (citation omitted).[6] The court of appeals' conclusion on that point is consistent with the position of most other courts of appeals, which have concluded that "[t]he focus of the language defining a scheme to defraud [as one reasonably calculated to deceive persons of ordinary prudence] is on the violator, not the victim. The definition provides the fact-finder with a standard for determining from the accused's actions whether the accused possessed the requisite mens rea from his actions." *United States* v. *Drake*, 932 F.2d 861, 864 (10th Cir. 1991); see *United States* v. *Green*, 745 F.2d 1205, 1207 (9th Cir.), cert. denied, 474 U.S. 925 (1985); *United States* v. *Coyle*, 63 F.3d 1239, 1243 (3d Cir. 1995). But cf. *United States* v. *Brown*, 79 F.3d 1550, 1557 (11th Cir. 1996) (concluding that government must prove in a mail fraud prosecution that "a reasonable person would have acted on the representations," but not analyzing the issue as one of materiality).[7]

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[6] The court of appeals in this case also noted that the case law language relied on by petitioners also "gestures, although clumsily, toward the indistinct border zone between real fraud and sharp dealing," or "puffing." Pet. App. 7a. But as the court also noted, "[petitioners'] argument is not that they were just puffing, but that their misrepresentations were so gross as to be unbelievable." *Id.* at 8a.

[7] In *United States* v. *Brown*, the Eleventh Circuit held that the evidence was insufficient to show that a prudent person, acting reasonably, would have relied on the misrepre-

Petitioners' formulation of materiality would inappropriately shift the focus of mail and wire fraud prosecutions from the accused to the victim. It would, in effect, put the victim on trial by forcing the government to prove that the victim (or, as here, the intended victim) would have acted reasonably in falling prey to a misrepresenter's blandishments. Such a rule would be inconsistent with the purpose of the mail and wire fraud statutes, which protect the gullible as well as the skeptical. A rule requiring proof beyond a reasonable doubt that the fraud have been capable in fact of deceiving a *reasonable* victim "would invite con men to prey on people of below-average judgment or intelligence, who are anyway the biggest targets of such criminals and hence the people most needful of the law's protection." Pet. App. 6a; see also *United States* v. *Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990); *United States* v. *Brien*, 617 F.2d 299, 311 (1st Cir.), cert. denied, 446 U.S. 919 (1980);

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sentations attributable to the defendants, and the court therefore reversed the defendants' mail fraud convictions. In our view, the reasoning and result in *Brown* are incorrect. Moreover, to the extent that the Eleventh Circuit relied in *Brown* on the language in the case law defining a scheme to defraud as one "reasonably calculated to deceive persons of ordinary prudence and comprehension," 79 F.3d at 1557, its analysis indicates that that language affords a defense to which the defendant is not entitled, *i.e.*, that the victim of a fraudulent scheme must act like a reasonable person. See *United States* v. *Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990) (rejecting the view that "no fraudulent scheme [could] exist[] because no reasonable person would have believed [the] misrepresentations"). Thus, even if materiality were an element of wire fraud, the language requested by petitioners should not be used to define it.

United States v. *Kreimer*, 609 F.2d 126, 132 (5th Cir. 1980).

3. Finally, review is not warranted in this case because the court of appeals correctly ruled that, in any event, any error in failing to instruct the jury on materiality was harmless beyond a reasonable doubt. The evidence of materiality was "overwhelming," Pet. App. 10a, and no rational jury that found that petitioners made the misrepresentations charged as part of the fraudulent scheme could have failed to find that those misrepresentations were material to Smith Barney's decision whether to extend a loan. Petitioners' misrepresentations substantially inflated the financial worth of the borrower (Coffman) and the collateral (the stock of FDC). Those misrepresentations were capable of influencing Smith Barney's decisions, for (as the court of appeals noted, *id.* at 4a) such misrepresentations go to the heart of an institution's decisions whether to advance a loan. It is no defense that the intended victim in this case was too smart to be taken in, for had McCausland not been "unusually alert, * * * the scheme might have succeeded." *Id.* at 5a.

Petitioner Beller argues (96-986 Pet. 5) that the failure to instruct the jury on the element of materiality constitutes a "structural" defect that can never be harmless error. There may be some disagreement among the courts of appeals as to whether a trial court's failure to instruct the jury on the element of materiality can be harmless error. Compare *United States* v. *Wiles*, 102 F.3d 1043, 1060-1061 (1996) (en banc), on reh'g, No. 94-1592, 1997 WL 61512 (10th Cir. Feb. 14, 1997) with, *e.g.*, *United States* v. *De Castro*, No. 95-4648, 1997 WL 20471, at *5-*6 (11th Cir. Feb. 5, 1997) (to be reported at 104 F.3d 1289). Even if

that issue were the subject of a ripe conflict, however, this case does not present a suitable vehicle for resolution of the issue. In the typical case in which materiality is contested, the defendant claims that the alleged misrepresentation is irrelevant to the decisionmaker, or is so trivial as to be beneath notice. In this case, by contrast, petitioners have contended that their misrepresentations were so extreme that "[a] sophisticated financial enterprise like Smith-Barney * * * would hardly regard [them] as an inducement to transact." 96-986 Pet. 6. There can be no serious doubt, however, that petitioners' misrepresentations about the assets of the borrower and the value of their collateral were "capable of influencing[] the decision" (*Gaudin*, 115 S. Ct. at 2313) of Smith Barney to advance them a loan on the restricted FDC stock.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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